Resthaven Corporation d/b/a Edgar P. Benjamin Healthcare Center *and* Local 285, Service Employees International Union, AFL–CIO. Case 1–CA–32505

December 23, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

Upon a charge filed January 19, 1995, and amended charge filed February 22, 1995, by the Union, the Regional Director for Region 1 issued a complaint March 3, 1995, against the Respondent, alleging that the Respondent engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the complaint and notice of hearing were served on the Respondent and the Charging Party.

On March 29, 1996, on the basis of an all-party stipulation, the parties filed with the Board a motion to transfer the instant proceeding to the Board without a hearing before an administrative law judge and submitted a proposed record consisting of the formal papers, parties' stipulation of facts with attached exhibits, including portions of affidavits, and the General Counsel's and the Respondent's briefs. On May 24, 1996, the Executive Secretary of the Board issued an Order granting the motion, approving the stipulation, and transferring the proceeding to the Board conditioned on the parties' submission of a missing affidavit. Thereafter, the General Counsel, the Charging Party, and the Respondent complied with the condition, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the stipulation, the briefs, and the entire record of this proceeding, and makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation engaged in the operation of a nursing home in Boston, Massachusetts, annually derives gross revenues in excess of $100,000 and purchases and receives at its Boston, Massachusetts facility products, goods, and materials valued in excess of $5000 directly from points outside the Commonwealth of Massachusetts. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that the Respondent violated Section 8(a)(5) by implementing a rule allowing the Respondent to inspect packages carried by employees when leaving the facility (the package inspection rule), without bargaining with the Union.

A. *Facts*

The Respondent, a nursing home, employs 150 employees in two bargaining units covered by a contract effective from May 1, 1994, through May 30, 1997. The contract contains a management-rights clause, which provides that the Respondent retains "the right to promulgate and enforce all reasonable rules and regulations relating to operations, safety measures, patient care and other matters." The parties' May 1, 1992, through April 30, 1994 contract contained identical language.

Since 1987 the Respondent has given an employee handbook to employees when they are hired. The handbook states that an employee may be terminated without prior warning for theft.

In January 1993 the Union protested the Respondent's installation of surveillance cameras, which the Union claimed the Respondent had done without bargaining.[1] The Respondent explained to employees that the cameras were an attempt to curb wandering residents, reduce car theft, and ensure safety. In 1994 the Respondent implemented additional security measures, which did not reduce the number of thefts. The Respondent suspected that employees committed some of the thefts.

In December 1994 the Respondent, without consulting with the Union, posted a memorandum to employees listing four rules for security, including:

> 3. Employees and visitors are encouraged not to bring packages into Resthaven and to notify Security if exiting the building with packages. *Any* and *all* packages are subject to immediate search.
>
> 4. Violations of these security measures will be considered as a major violation of Resthaven policy, and will have severe consequences up to, and including, termination.

The Union complained that it was not consulted about the package inspection rule. The Respondent replied that it implemented the rule because of the continued thefts, the complaints of patients and their families, and the winter holiday season, and that the manage-

[1] The Union did not file a grievance but did file an unfair labor practice charge. The Regional Director deferred ruling on the charge, considering it a contractual matter, and the Union eventually withdrew the charge.

ment-rights clause entitled the Respondent to do so. The Union demanded bargaining.[2] The Respondent replied that bargaining was not required.

On December 15, 1994, the Respondent revised the security policy. The revised package inspection rule read:

> 3. Employees and visitors are encouraged not to bring packages or oversized carrying bags into Resthaven and to notify Security if exiting the building with packages. Any such packages taken out of the building will be searched on a random basis and all such packages will be searched if Security learns or suspects that there has been a theft.
>
> Violations of these security measures will be considered a major violation of Resthaven policy, and will have severe consequences up to, and including, termination.

The Respondent did not bargain about the revised policy.

There has been a substantial decrease in the number of thefts since the Respondent implemented the package inspection rule. Because employees have generally complied with the notice requirement of the package inspection rule, the Respondent has not inspected any packages.

B. *The Parties' Contentions*

The General Counsel argues that the package inspection rule is a mandatory bargaining subject and that the Union has not waived its right to bargain about the change in security measures. The Respondent argues that the rule is not a mandatory subject; that, if it is mandatory, it is a minimal change in a preexisting rule about theft and therefore there was no need to bargain; and that the Union has waived its right to bargain about the change; or, alternatively, implementation of the rule is covered by the contract's management-rights clause.

C. *Analysis*

1. The package inspection rule is a mandatory bargaining subject

In *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979), quoting *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 222–223 (1964) (Stewart, J., concurring), the Supreme Court described mandatory bargaining subjects as those subjects that are "plainly germane to the 'working environment'" and are "not among those 'managerial decisions, which lie at the core of entrepreneurial control.'" We find the package inspection rule is germane to the working environment and is not a core entrepreneurial decision.

In determining whether the package inspection rule is germane to the working environment, we find *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975), instructive. In that case, the respondent unilaterally implemented polygraph testing of employees in an attempt to find out who was responsible for vandalism at the employer's facility, and employees who refused to submit to the test were subject to discipline. The Board found that promulgation of the polygraph testing policy was a mandatory subject of bargaining. As the Board explained in *Johnson-Bateman Co.*, 295 NLRB 180, 183 (1989), such testing is a condition of employment "because it has the potential to affect the continued employment of employees who become subject to it."

The record here establishes that the Respondent implemented the package inspection rule because of concern about thefts on its property, which earlier implemented security measures had not reduced. The Respondent considers violations of the package inspection rule to be major violations of Resthaven policy, which could have severe consequences up to, and including, termination. Thus, the package inspection rule "has the potential to affect the continued employment of employees who become subject to it" and is therefore a condition of employment.

The Respondent contends that bringing packages into or out of the facility without inspection has little or nothing to do with the job duties or work environment of employees and consequently should not be considered a condition of employment. This argument misses the point. Although one may make the same argument about smoking at the jobsite or using drugs or alcohol away from the jobsite, the Board has found policies regarding both to be mandatory subjects. See *W-I Forest Products Co.*, 304 NLRB 957, 958–959 (1991) (smoking ban), and *Johnson-Bateman*, supra (drug/alcohol testing). The element that is crucial to finding an employer's policy to be a condition of employment is not whether the subject of the policy is related to job performance, but whether the policy has the potential to affect continued employment of employees who become subject to it.

We also find that the package inspection rule is not among that class of managerial decisions that lie at the core of entrepreneurial control. Again we find *Medicenter* and *Johnson-Bateman* instructive. In *Medicenter*, supra at 676, the Board found in agreement with the judge that

> [t]he institution of a polygraph test . . . is not fundamental to the basic direction of the enterprise[.] . . . It is, rather, a change in an important facet of the workaday life of employees, a change in personnel policy freighted with potentially serious implications for the employees

[2] The Union did not file a grievance.

> which in no way touches the discretionary "core of entrepreneurial control."

And, in *Johnson-Bateman*, supra at 184, after quoting the above, the Board held that the institution of drug/alcohol testing "does not involve . . . changing the scope or nature of the Respondent's enterprise."

The same may be said of the package inspection rule. The core purpose of the nursing home is long-term care of elderly and infirm patients. The package inspection rule does not change how the Respondent provides care for patients in any way. While we in no way suggest that protecting patients' property as well as property belonging to employees and to the nursing home is not a significant concern for the Respondent, we do not believe that a policy designed to prevent theft from the facility constitutes a change in the basic direction, scope, or nature of the nursing home.

The Respondent, citing *Peerless Publications*, 283 NLRB 334 (1987), argues that protecting an employer's core purpose is an additional basis for finding that an employer's decision lies at the core of entrepreneurial control. The Respondent then contends that the package inspection rule protects the core purpose of the nursing home by preventing theft of patient property.

In *Peerless Publications*, supra at 335, the Board held that a newspaper employer could be exempt from bargaining about implementation of an ethics code because "protection of the 'editorial integrity of a newspaper lies at the core of publishing control.'"[3] The circuit court, which had remanded an earlier Board decision in the proceeding, agreed with the Board. The court found that a newspaper's integrity is to its "ultimate product and to the conduct of the enterprise" "what machinery is to a manufacturer." 636 F.2d 550, 560 (D.C. Cir. 1980).

We find significant the court's comparison of a newspaper's integrity and its ultimate product with what machinery is to a manufacturer. We take this analogy to mean that the newspaper's ethics code is integral to the production of the newspaper's core product in the same way that machinery is integral to the production of a manufacturer's core product. In other words, the court was not suggesting, as the Respondent argues, that protecting the core purpose is *an additional* basis for finding an employer's decision to be entrepreneurial. Employers in every industry have a strong interest in preventing employee theft. Thus, if the Respondent's argument were correct, the exemption from bargaining about core entrepreneurial decisions would become the rule rather than the exception, at least so far as security matters are concerned. We do not believe *Peerless Publications* should be read so broadly. See *W-I Forest Products*, supra, 304 NLRB at 958–959 (distinguishing *Peerless Products*).

In sum, we find that the package inspection rule is germane to the working environment and is not a decision taken with a view toward changing the basic direction, scope, or nature of the Respondent's enterprise.

2. The package inspection rule is a substantial change from past practice

The Board has long held that an employer is not obligated to bargain over changes so minimal that they have no significant, substantial, and material impact on employees' terms and conditions of employment. *W-I Forest Products*, supra at 959. The Respondent argues that there should be no bargaining obligation in this case because the package inspection rule made only a minimal change in a preexisting rule about theft. We do not believe the parties' stipulation supports this contention.

As mentioned above, the Respondent implemented the package inspection rule because of concern about thefts on its property, which earlier implemented security measures had not reduced. It is logical to assume that the Respondent hoped the new rule would make a significant difference in the theft problem and, indeed, the Respondent argues that it did make a difference. Moreover, the stipulation establishes that the package inspection rule had substantial impact on employees' terms and conditions of employment in at least three respects.

First, although before implementation of the package inspection rule an employee who committed theft on Resthaven premises could be terminated, there was no rule that a package carried by an employee leaving the workplace could be inspected. Under the new rule, an employee can no longer leave the workplace with a package without being subject to search. Thus, the new rule introduces a restriction on the privacy an employee might otherwise expect.

Second, under the package inspection rule, the Respondent's security guards have authority to demand that employees submit to a search and an employee who refuses to submit to a search can be terminated. Whereas previously an employee who committed theft could be discharged, under the new rule an employee could be discharged for refusing to cooperate. Thus, the new rule added a grounds for discipline not previously part of the Respondent's written rules. *W-I Forest Products*, supra at 959.

Finally, we find that the change in the method of investigating theft occasioned by the package inspection rule is comparable to the change introduced by polygraph testing in *Medicenter*. In *Johnson-Bateman*,

[3] We note that the Board in *Peerless Publications* found that the respondent was not free unilaterally to implement the particular ethics code at issue there, because the code was overbroad and not narrowly tailored to protecting the editorial integrity of the newspaper. Id. at 336–337.

supra at 183, the Board explained that the change in *Medicenter* "introduced relatively sophisticated technology, substantially varying both the mode of the investigation and the character of proof on which an employee's job security might depend." Similarly, the inspection of packages is a method of investigation not previously employed by the Respondent, and searches would potentially uncover evidence previous investigative techniques might not, i.e., stolen items in the possession of those searched. Thus, the package inspection rule is "a significant alteration in the method used . . . to elicit evidence from employees which may convict them of misconduct." *Medicenter*, supra at 676.[4]

In sum, we conclude that the package inspection rule had a significant, substantial, and material impact on employees' terms and conditions of employment.[5]

3. The Union did not waive its right to bargain about the package inspection rule

The parties' 1994 contract contains a management-rights clause, which provides that management retains "the right to promulgate and enforce all reasonable rules and regulations relating to operations, safety measures, patient care and other matters." The Respondent argues that the Union has, by agreeing to this provision, waived its right to bargain about the package inspection rule. We do not agree.

It is axiomatic that the Board will not infer a waiver of a statutory right unless the waiver is "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). In assessing waiver, the Board looks to a variety of factors, including the contract language and bargaining history. *Park-Ohio Industries*, 257 NLRB 413, 414 (1981), enfd. 702 F.2d 624 (6th Cir. 1983).

The contract language makes reference to general subject areas—"operations, safety measures, patient care and other matters"—in which the Respondent retains the right to act unilaterally. The Respondent argues that the package inspection rule relates to each of these subject areas.

The contract language, however, makes no specific reference to inspecting employee packages or to theft prevention measures. The parties' stipulation provides no information about bargaining history that might shed light on the meaning of the contract language. Absent some evidence, such as bargaining history, we do not believe that the general subject areas referenced in the management-rights clause clearly and unmistakably indicate that the Union intended to waive its statutory right to bargain about the Respondent's implementation of a rule allowing the Respondent to inspect packages carried by employees when leaving the facility. See *Johnson-Bateman*, supra at 185.

The Respondent argues that the Union's acquiescence in the past to unilateral actions to control theft, coupled with the contract language, constitutes waiver. The past actions to which the Respondent refers are the issuance of the employee handbook, which the Union did not contest, and the installation of surveillance cameras, which the Union did not grieve. The Respondent points out that when these actions occurred, the parties were operating under an earlier collective-bargaining agreement, which contained a management-rights clause that was identical to the management-rights clause in the parties' 1994–1997 contract.

We do not agree with the Respondent that the parties' past practice evidences the Union's waiver of the statutory right at issue in this case. Board precedent makes clear that a "union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time." *Owens-Brockway Plastic Products*, 311 NLRB 519, 526 (1993), quoting *Owens-Corning Fiberglass*, 282 NLRB 609 (1987). Thus, we find that the Union's acquiescence in the Respondent's past unilateral issuance of the employee handbook and installation of surveillance cameras does not constitute a waiver of the Union's right to bargain about the Respondent's new rule allowing the Respondent to inspect packages carried by employees when leaving the facility.

The Respondent argues, alternatively, that it had a right to implement the package inspection rule because implementation of such a rule is covered by the contract. The Respondent cites circuit court decisions, including *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992), which hold that where there is a contract provision, the Board must interpret the contract rather than utilize a waiver analysis.

The Board, however, adheres to the clear and unmistakable waiver standard and declines to apply a less stringent "contract coverage" test to determine whether an employer may invoke contract language as a defense to an alleged failure to bargain over changes in mandatory subjects of bargaining. The Supreme Court has upheld the clear and unmistakable waiver standard when discussing the impact of a contractual provision

[4] The Respondent focuses on the statement in *Medicenter* that the polygraph testing "introduced relatively sophisticated technology." We disagree with the Respondent's argument that the package inspection rule is not a substantial change because it does not involve technology. It is true that in *Medicenter* sophisticated technology was the means by which the respondent significantly varied a condition of employment. *Medicenter*, however, does not hold that a change in a condition of employment is not substantial unless it is accomplished by the introduction of new technology.

[5] The Respondent's reliance on *Bath Iron Works Corp.*, 302 NLRB 898 (1991), is misplaced. At issue in that case was whether the Board should defer to an arbitrator's award. Whether an arbitrator was "palpably wrong" in deciding that institution of drug/alcohol testing was not a substantial change is different from the standard the Board applies when deciding de novo the merits of an unfair labor practice charge.

on the waiver of a statutory right. *Metropolitan Edison*, supra, 460 U.S. at 708. See *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995), enf. denied on other grounds 89 F.3d 228 (5th Cir. 1996).

We further find that even under the seventh circuit's approach, the Respondent has failed to show that it had a right under the contract to implement the package inspection rule. In *Chicago Tribune* the court found that in agreeing to a management-rights clause giving the company the right to "establish and enforce reasonable rules and regulations relating . . . to employee conduct," the union gave up its right to bargain about rules relating to employee behavior, including the company's implementation of alcohol and drug testing. The court in *Chicago Tribune* thus concluded that there was a clear connection between the regulation of "employee conduct" and the institution of alcohol and drug testing. We do not perceive such a clear connection between the package inspection rule instituted by the Respondent and the general areas of "operations, safety measures, patient care and other matters" covered by the management-rights clause in this case.[6] See *Klein Tools*, 319 NLRB 674 fn. 2 (1995). Further, the package inspection rule is a security matter. The parties' stipulation fails to demonstrate affirmatively that the parties intended the term "safety measures" to encompass security matters. For these reasons, we conclude that the Respondent has not shown that the package inspection rule is covered by the management-rights clause.

CONCLUSION OF LAW

By implementing a package inspection rule without bargaining with Local 285, Service Employees International Union, AFL–CIO, the Respondent has violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Resthaven Corporation d/b/a Edgar P. Benjamin Healthcare Center, Boston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing a package inspection rule without bargaining with Local 285, Service Employees International Union, AFL-CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All permanent full-time and permanent part-time nursing assistants, occupational therapy aides, dietary employees, cooks, maintenance, housekeepers and laundry employees employed by the Respondent at its Roxbury, Massachusetts location, but excluding ward secretary, office clerical employees, switchboard operators, physical therapists, social workers, activities director, professional employees, chef, food supervisor, housekeeping supervisor, temporary employees, part-time employees working less than 16 hours per week, guards, and supervisors as defined in the Act and all other employees.
>
> All licensed practical nurses, registered nurses, and other technical employees employed by the Respondent at its Roxbury, Massachusetts location, but excluding licensed practical nurses and registered nurses permanently in charge of each unit on the 7 a.m. to 3 p.m. shift and all other employees, guards, the director of nursing, the assistant director of nursing, nurse supervisors, staffing coordinator, nurse educator, head nurses, and other supervisors as defined in the Act.

(b) On request, rescind the package inspection rule that was implemented in December 1994.

(c) Within 14 days after service by the Region, post at its Boston, Massachusetts facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of

[6] We do not believe that the provision in the management-rights clause permitting the Respondent to "discharge or otherwise discipline employees for just cause" can be characterized as an express term permitting the Respondent to make general rules relating to employee behavior.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 19, 1995.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT implement a package inspection rule without bargaining with Local 285, Service Employees International Union, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining units:

All permanent full-time and permanent part-time nursing assistants, occupational therapy aides, dietary employees, cooks, maintenance, housekeepers and laundry employees employed by us at our Roxbury, Massachusetts location, but excluding ward secretary, office clerical employees, switchboard operators, physical therapists, social workers, activities director, professional employees, chef, food supervisor, housekeeping supervisor, temporary employees, part-time employees working less than 16 hours per week, guards, and supervisors as defined in the Act and all other employees.

All licensed practical nurses, registered nurses, and other technical employees employed by us at our Roxbury, Massachusetts location, but excluding licensed practical nurses and registered nurses permanently in charge of each unit on the 7 a.m. to 3 p.m. shift and all other employees, guards, the director of nursing, the assistant director of nursing, nurse supervisors, staffing coordinator, nurse educator, head nurses, and other supervisors as defined in the Act.

WE WILL, on request, rescind the package inspection rule that we implemented in December 1994.

RESTHAVEN CORPORATION D/B/A EDGAR P. BENJAMIN HEALTHCARE CENTER